## IN THE CIRCUIT COURT OF HENRY COUNTY.

M. L. BRAMMER'S Admr. *v.* NORFOLK & WESTERN R. CO.

**Death by Wrongful Act—Res Adjudicata.**—This was a suit brought by Brammer's administrator against the defendant company to recover $10,000 damages for the death of Brammer, for injuries causing the death of the intestate inflicted at a public crossing about two miles west of the town of Martinsville, Va. Brammer brought suit for his injuries during his lifetime and died before trial, and the suit was revived in his administrator's name, and the case was decided against the plaintiff on the merits. The court held that a suit could be maintained by Brammer for the injuries he sustained during his lifetime, and a separate and independent suit could be maintained by his administrator for his death, but as the first suit for the injury to Brammer in his lifetime was decided adversely to the plaintiff, the latter suit by his administrator for his death could not be maintained, as that suit could only be maintained under §§ 2902, 2903, of the Code of Virginia, where the party injured could maintain an action for his injury, and a demurrer to the defendant's pleas of res adjudicata was overruled.

This is an action brought by the administrator of the intestate by virtue of §§ 2902, 2903, Code, for the benefit of the persons provided for in that act. One action in the name of the administrator has been prosecuted to a final conclusion in the court of last resort of this State. This action was originally brought by Brammer in his lifetime, and was intended to secure damages for alleged negligent injuries inflicted upon the plaintiff by the railroad company. Brammer died before his case came to hearing, and it was revived in the name of his personal representative pursuant to the provisions of § 2906.

On the final hearing of this action in the circuit court, the defendant demurred to the evidence and upon consideration of this demurrer it was considered that the plaintiff was not entitled to a recovery. To this judgment of the circuit court, a writ of error was awarded by the court of appeals.

After full argument in that court, the judgment of the trial court was affirmed.

This of course was a final disposition of the case on its merits.

The present action is for the benefit of the wife and children of the intestate.

It is objected on the part of the defendant that two actions cannot be brought for the same wrong, or negligent injury; that the former action, while a revival of Brammer's action, was in substance, and should have been held by the trial court to be, the action contemplated by § 2903; that while the statute allows an action brought by a plaintiff for personal injuries, and not prose-

cuted to judgment before his death, to be revived in the name of the administrator, that this revival was intended to be limited to those cases in which the death of the plaintiff was due to other causes than the injuries of which he complained; that in case he died pending the prosecution of his claim for damages, for the injuries inflicted by the defendant, the right to recover in this action the damages contemplated by the common law, was forever lost, and the then pending action by proper amendments should be transformed into one under § 2903.

The action brought by Brammer was allowed to be revived, and proceeded with in the name of the administrator, pursuant to § 2906. This section in part is as follows: And where an action is brought by a party injured for damages caused by the wrongful act, neglect or default of any person, or corporation, and the party injured dies, pending the action, the action shall not abate by reason of his death, but his death being suggested, it may be revived in the name of the personal representative.

This revived action, was certainly the intestate's action, and was prosecuted for the benefit of *his estate.*

The ruling of the trial court in allowing the action brought by the intestate, to be revived, and proceeded with in the name of the administrator, was objected to as error, and it is now urged that in spite of the ruling of the court, the revived action was, in substance, a proceeding under § 2903, and having proceeded to a final judgment adverse to the plaintiff, he is estopped from prosecuting further the pending action. It seems, however, to be well established by numerous authorities that the revived case, was not a case under § 2902, but was a separate action, and for the one wrongful act of the defendant, it was potentially liable to two recoveries, one in the revived common-law action, and the other in an action under § 2903. The direct question presented for decision in Anderson *v.* Hygeia Hotel Company, 92 Va. 687, was whether, under the law as it then stood, an action for damages for personal injuries caused by the wrongful act of any person or corporation, could be brought within one year, or five years, from the time such injury was inflicted.

The plaintiff, Anderson, was injured by falling into an open pit, filled with hot oil, on the premises of the defendant.

The accident happened on January 12, 1892; the suit was brought in June, 1893.

In the progress of its opinion, the court drew the distinction between an action for injuries given by the common law, and one under §§ 2902, 2903.

The latter act is "modeled upon Lord Campbell's Act, and in its essential features, is substantially the same." Acts of this character were enacted in this, and in other states, for the obvious and sufficient reason that at common law no action was main-

tainable against a person who occasioned the death of another by his wrongful act, neglect, or default.

Speaking of §§ 2902, 2903, or our reproduction of Lord Campbell's Act, the court uses the following language on page 691, of the case supra: "It is intended to withdraw from the wrongdoer the immunity from civil liability which the rule of the common law afforded him and to provide for the recovery of damages, notwithstanding the death of the injured person. In so doing, however, it plainly did not intend to continue, or cause to survive, his right of action for the injury, but to substitute for it, and confer upon his personal representative, a new and original right of action."

"It is very clear that this new right of action, though founded upon a wrong already actionable by existing law, in favor of the injured person for his damages, was not intended to be, and is not a derivative one. When the right of action which the deceased person had in his lifetime survives, his personal representative sues as the legal owner of the personal estate which has passed to him in course of law, and the recovery is for the benefit of and constitutes assets of the estate of the decedent with the consequent liability for the payment of his debts. The right of action of the personal representative is the same that was possessed by the deceased in his lifetime. It proceeds on the same principles, is sustained by the same evidence, and the measure of recovery is the same. But very different is the right of action given by the act in question. (Sections 2902, 2903.) The act requires the suit to be brought by and in the name of the personal representative, but he by no means sues in his general right of personal representative. He sues wholly by virtue of the statutes, and in respect of a different right. His suit proceeds on different principles. He sues not for the benefit of the estate, but primarily and substantially as trustee for certain particular kindred of the deceased, who are designated in the statute.

"If the effect of the statute is, as was contended, to cause the right of action of the injured person to survive, the suit by his personal representative would be to recover damages for the injury the deceased had sustained and the detriment caused to his estate. The same kind of evidence would be necessary and admissible to support the action that would be proper if the injured person himself were suing. There would be the same elements of damage for the consideration of the jury in assessing the damages. The evidence would mainly relate to and the damages be for the physical and mental suffering of the deceased, and the injury and loss generally sustained by him and his estate. But in a suit by the personal representative under the statute, the evidence would primarily relate to and the damages be not only for the pecuniary loss the wife, husband,

parent, or child, as the case might be, had sustained, but it would be proper for the jury, in computing the damages, to take also into consideration, the grief and mental anguish of such relatives, and their loss in being deprived of the care, attention and society of the deceased, and to include therefor in the verdict, such sum as the jury might deem fair and just."

The limit of recovery, too, is different. In the one case, it is the amount of his loss that can be proved; in the other, it is $10,000.

Again, if the action (of the Administrator under § 2903), were only survival of the right of action of the injured person, the recovery would constitute assets of his estate, and be subject to the payment of his debts; whereas it is expressly understood by the statute that the amount recovered under the statutory right of action, except where there are "no such kindred" as are designated by the statute, shall be free, from all debts and liabilities. Vd. pp. 692-3. It is apparent from the foregoing citations that our court treats the right of suit under §§ 2902, 2903, and the right of action, which is the right of the party, personally to sue for injuries received, as separate and independent rights, which in effect are for different beneficiaries. In the one case the general estate of the deceased profits by the recovery; in the other, the persons designated by the statute.

It may happen that these actions are conducted in the name of the same person, the personal representative of the deceased, but he sues in different capacities and for different persons. The persons who take the recovery under §§ 2902, 2903, take it because the statute gives it to them directly, and not by virtue of the statute of descents and distributions.

To the same effect as the case supra are many other cases in this country and in Great Britain.

The case of Leggott's Admr. *v.* Great Northern R. Co., First Queen's Bench, p. 239, is directly in point.

In that case the wife as administratrix of her husband, who was killed by the railroad, recovered $2,500 in an action brought under Lord Campbell's Act. Subsequently in her capacity as administratrix, she sued the same company, on account of the same injuries, for the benefit of the intestate's general estate.

It was held, that the recovery in the first action was not a bar to the second action and that there was no estoppel of which either party could take advantage, as the plaintiff sued in a different right in either action. Among other things the court said: "It seems that though nominally the machinery of the action in the one case is the same as the machinery in the other, yet the action in which the verdict was recovered was an action of a very special and limited character. It was an action given expressly by the statute, and must be confined within the limits

of the statutes. It was intended to provide for what the law had not before provided for. The executor is a mere machine and his interest is entirely within the limits of the Campbell Act.

The object and effect of the two actions are entirely different. The executrix in a case under the act does not sue in respect of anything that belonged to the deceased or to his estate, but by force of the statute. Estoppel, therefore, does not arise. The administratrix now sues, not in the same, but in very different rights. The action under the Campbell Act is not connected in the slightest degree with the estate of the deceased. The act merely provides the nominal person to bring the action for the benefit of the designated beneficiaries.

On the one case, the personal representative sues as legal owner of the general personal estate; in the other, as trustee in respect of a different right altogether, on behalf of particular persons designated in the act. Id., pp. 244, 245. The foregoing distinctions are obvious, sound and fundamental.

Another case directly in point is Brown *v.* Chicago and Northwestern R. Co. (Wis.), 44 L. R. A. 579.

An elaborate opinion was filed in the case in the first instance by Judge Marshall and later, on a petition to rehear, a still more elaborate and comprehensive opinion was delivered by the same judge. The conclusion reached was that a cause of action for personal injuries, that is, the common-law right of the injured party to sue for such injuries, was separate and distinct from the cause of action in favor of surviving relatives. That is the cause of action given in this state by §§ 2902, 2903.

The reasoning of the court proceeds along the same lines as that pursued in Anderson *v.* Hygeia Hotel Co., and Leggott's Admx., supra.

The court says that the action for the relatives is a new action which is brought, not for the benefit of the estate, but solely for the benefit of the relatives; that the losses in each case are recoverable in entirely different rights. Further on the court discusses at length the proposition referred to supra, that in case of death from the personal injuries inflicted by the defendant, the right of action to the designated relatives is exclusive, but dismisses it as unsound. The language of the court in this connection is as follows: "It is true there is but one wrongful act, but that is not the sole ground of action in the right of the deceased or the relatives. It takes the wrongful act and the loss to make the complete cause of action, and as the loss to the person upon whom the injury is inflicted must be recovered by or in his right, and the loss to the surviving relatives, or in their right, the causes of action are cleraly distinct. Thus, as several persons suffer pecuniary loss, by one wrongful act, each may very properly have his independent cause of action and remedy for the loss resulting to him."

Later, in the opinion on the petition for a rehearing, the court quotes approvingly as follows, from the case of Davis *v.* St. Louis, etc., R. Co., 53 Arkansas 117 (see p. 589, 44 L. R. A.): "The right which accrued to the deceased revives to his administrator by virtue of the statute; the right to the relatives results from, and accrues on, the death of the injured party. Both actions are prosecuted in the name of the personal representative where there is one, and may proceed pari passu, without a recovery in the one having the effect of barring a recovery in the other, because the suits are prosecuted in different rights, and the damages are given upon different principles to compensate different injuries.

"One is for the loss sustained by the estate and for the suffering from the personal injury in the lifetime of the decedent, the recovery in which goes to the benefit of the decedent's creditors, if there are any; the other takes no account of the wrong done to the decedent, but is for the pecuniary loss to the next of kin, occasioned by the death alone. The death is the end of the period of recovery in the one case, and the beginning in the other. In one case the administrator sues as legal representative of the estate for what belonged to the deceased, in the other he acts as trustee for those upon whom the act confers the right of recovery for the pecuniary loss inflicted upon them." But it is needless to prolong this opinion with further citations from the courts which maintain the proposition that two separate and distinct rights of action are afforded by one act of personal injury which results in death.

These cases are given in Anderson *v.* Hygiea Hotel Co., and Brown *v.* Chicago R. Co., cited supra.

Suffice it to say that it seems clear from reason, and the authority of the cases cited, that the common-law right of action for injuries received, and the relatives' right of action in case death results from these injuries, are in large measure separate and distinct rights. They are certainly separate and distinct rights of action to this extent that if the injured party dies, pending the prosecution of his common-law action, the same may be revived and proceeded with, in the name of the administrator, to judgment and recovery without affecting the right of the relatives to recover for the same wrong under §§ 2902, 2903. A judgment for personal injuries suffered by an employee is no bar to a subsequent action for death caused by such injuries. Clare *v.* New York & N. E. R. Co., 51 N. E. 1083.

The same case holds that a judgment for an administrator in an action by him for personal injuries suffered by his intestate, is a bar to a second action by him to recover for such injuries under the common law. But this ruling is not in conflict with the other. It is plainly right upon the obvious principle that

two rights of recovery in the same person, one at common law, and one under the statute, but both for one and the same wrong, do not allow two recoveries, but merely put the injured party upon his election, in respect to his remedy. Plainly, in the language of the case supra, a plaintiff would not be permitted to obtain verdicts both at common law, and under the statute, for the same personal injuries. This, however, is where the plaintiff is the same person and suing in the same rights, but the situation is different when the plaintiff is the same, but suing in different capacities. Anderson *v.* Hygeia Hotel Co., cited supra, is very clear in its discussion of the separate character of these rights.

It is true that this case would be authority for the proposition that Brammer's case could not be revived, for it holds, under the law as it then stood, that actions of this character would die with the person. But we are not concerned with this conclusion, but rather with the differentiation of the two rights.

A statute passed subsequent to this decision, and construed in Birmingham's case, 98 Va. 551, furnishes ample authority for the action of the court in allowing Brammer's action to be revived after his death and proceeded with, as his action, in the name of the administrator.

It is considered, therefore, that it was not error to allow Brammer's case to be revived, and it is further considered that when this case was revived, it was in no sense the action for the benefit of the relatives, contemplated by §§ 2902, 2903. But there is another objection urged to the further prosecution of the pending action. This objection relates to, and is founded upon the result in Brammer's action.

The court certainly decided in that case that Brammer had no cause of action. He was judicially ascertained to have been guilty of contributory negligence. The defendant rests its second objection upon this ascertainment.

It insists that if Brammer had no cause of action, there was no cause of action for any one.

The plaintiff finds an answer to this contention, in the distinctions which have been noted between an action under Lord Campbell's Act, and Brammer's common-law action, revived under our statute.

He points to the distinctive character of these actions, and insists that as they are brought in different capacities, the principles of estoppel and res adjudicata cannot apply, and that what is done in the one case cannot operate to defeat, or to affect in anywise the rights of the parties in the other case.

But this contention is rather sweeping, and to the full extent claimed, is not supported by the authorities.

For instance, it has been held in some jurisdictions, and rightly,

I think, that if the injured party's right of action for injuries sustained, was extinguished in his lifetime by satisfaction, the right of the relatives to sue after death was lost. (See Brown *v.* Chicago & Northwestern R. Co., supra, pp. 582, 584 and 587.)

"The only condition of liability under the other provision (the one relating to the right of the relatives to sue) is the existence of an actionable claim in the right of the injured party, at the time of his death, and the existence of the beneficiaries mentioned in the statute."

The liability of the wrongdoer, *while dependent on the condition named,* is not on the actionable claim called for to satisfy such condition, but on a new right created by the statute, the right of the surviving relatives to compensation for the loss suffered by them (p. 582).

"Two causes of action exist, one in the right of the estate, and the other in the right of the surviving relatives, where the cause of action of the deceased is not extinguished before his death." (p. 584.)

"A cause of action unsatisfied at the death of the injured party for compensation for his injuries, is a condition of the operation of such section so as to give a right of action to the survivors therein named." The extinguishment of the primary cause of action leaves the statute with no office to perform. While before the death, there came to be but one cause of action, if that survive, there may be two. (p. 587.)

There are other authorities to the same effect, but reaching this conclusion from the phraseology of the local act. (See the Canadian cases cited in Judge Marshall's opinion in Brown *v.* Chicago & Northwestern R. Co.)

The proposition maintained by these cases seems to be supported by reason. There are different losses, it is true, recoverable in different rights, and the second action is not a derivative of the first. "Both losses are different on one injury." If the injury exists, with a consequent right of action therefor, two recoveries are possible in strict conformity with the essential distinctions which have been discussed; but a right of action, existent in the intestate at the time of his death, is a condition precedent for the successful maintenance of the action for the relatives.

The action for the relatives is so far dependent upon the intestate's right of action, that should this latter right, the primary right so-called, become extinguished at any time antedating the injured party's death, the other, or dependent, right is thereby lost.

The cases cited, however, are cases in which the injured party received compensation in his lifetime. They do not decide the precise question presented in the case in hand.

Still, however, the analogy of these cases is very strong. If

Brammer had accepted compensation from the defendant, and thereby extinguished his right of action, the present proceeding could not be maintained according to the authorities cited.

This conclusion is placed on the ground that he would have no right of action at his death. He had extinguished it by his voluntary action. But in the case before me, the highest court of his state has solemnly ascertained in a proceeding instituted by the injured party, that he had no right of action against the defendant, that such a right was not only not in existence at the time of the intestate's death, but had never come into being. It never had an existence at any time.

What effect should be given to this adjudication in the light of the authorities cited, and in especial, of those cases construing statutes using language similar to, if not identical with ours? The precise language of § 2902 is as follows: "Whenever the death of a person shall be caused by the wrongful act, etc., of any person, corporation, etc., the act neglect, etc., is such as would (if death had not ensued) have entitled the party injured to *maintain an action, and recover damages* in respect thereof, then and in every such case the person who, or corporation, etc., which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the party injured, etc." This is the action which is to be brought by the administrator for the relatives under § 2903. Now, what is the condition under which this action can be brought? What is the requirement under this section for the liability of the alleged wrongdoer to the relatives. The answer to these inquiries is that the decedent must have had such a case as would have entitled him at the time of his death to maintain an action and recover damages; that is, a case sufficient for recovery. If he had such a case, then the defendant will be liable to an action for damages on the part of the relatives. Suppose that Brammer had prosecuted his case to a final hearing in his lifetime, and on that hearing, it had been ascertained, in the language of the statute that he "was not entitled to maintain an action to recover damages" in respect of the defendant's act, could it be successfully contended, that after the death of the plaintiff the defendant would be "liable in an action for damages" for the benefit of relatives? Upon what ground could the right to maintain this second action be placed? The condition of successful maintenance for the dependent action is that the injured party was entitled to maintain an action on his part to recover damages for the injuries inflicted. As soon as the decision of the court ascertains that the party himself was not entitled to maintain any action, that he had no right of recovery against the defendant, then such a finding, or so at least it seems to me, ought to be even more potent to destroy the right to recover in the secondary

action, than payment to the injured party in his lifetime. Payment would indicate an admission of liability on the part of the defendant, while the decision of the court establishes the hollowness of the plaintiff's claim. It is an ascertainment in fact that he had no claim; not only that he had no present claim at the time of his death, but the finding relates back and ascertains that he had no valid claim at any time. The language of the Wisconsin statute, which is kindred to ours, is that "liability of the wrongdoer exists where the deceased could have recovered, if death had not ensued." Commenting on the language, Judge Marshall says: "That clearly excludes the idea that where the decedent receives satisfaction for his injuries, the conditions requisite to the right of surviving relatives, may exist notwithstanding." The Wisconsin statute, so far as it is cited by Judge Marshall, does not seem to be different from ours, so that Judge Marshall's opinion as to its meaning would be pertinent authority for drawing a like conclusion from our statute upon a like state of facts.

But it may be said that conceding that the payment of the decedent's claim in his lifetime, or the judicial ascertainment in his lifetime that he has no right of recovery, would operate to bar proceeding by the relatives, yet as neither of these things occurred in the case in hand, these principles would not apply. But it would be a refinement, indeed, to hold that a decision on the merits in Brammer's own case, rendered subsequent to the latter's death, would not have the same effect, as a like decision rendered in the same action prior to his death. The action in which the decision was rendered was Brammer's action revived as provided for by statute. Any decision on the merits in this case related to the time of the intestate's death, and ascertains, if it was in the negative, that, as of this date, Brammer was not entitled to maintain an action for damages in respect of the defendant's act.

Truly it would be a singular situation, and one hardly in the contemplation of our statute, in view of its language used, that after a court of competent jurisdiction has ascertained in a suit brought by the party himself that the alleged wrongful acts which constitute the sole foundation of any recovery against the defendant, are not of an actionable character, and that the injured person is not entitled to maintain an action by reason of them, or to recover damages on their account, other parties in another and subsequent proceeding may proceed to show in an action for their benefit, founded upon the same alleged act of the defendant, that at the time of the intestate's death, he was, as a matter of fact, the judgment of the court to the contrary notwithstanding, entitled to maintain an action against the defendant company and to recover damages for the very acts in

respect of which recovery was denied to the very man who suffered the injuries which resulted in his death. It may be said that if Brammer's action had not been brought, the plaintiff in the present action would be allowed to show as the ground of his present right of recovery, that had Brammer sued, he would have been entitled to damages. This is true and there would be no incongruity in such a course. The incongruity appears as soon as the plaintiff undertakes to show, despite the finding of the court in Brammer's case, that Brammer, at the time of his death, was entitled to maintain an action against the defendant, and to recover damages for the very acts which are the basis of the present action, and the foundation upon which rests the right of recovery therein. Evidently, the courts which have upheld the distinctive character of the actions which may be brought respectively by the injured party, and his relatives in case of death, have considered that the voluntary act of the injured party could take away the relatives right of suit, by removing the prop upon which that right is considered to rest.

This prop, as we have noted, is an existing right of recovery in the injured party himself, at the time of his death. It may seem to be a distinction without sufficient foundation in reason, that satisfaction for the injury, voluntarily received in the lifetime of the injured party, will bar the relatives from suing for the death, while their right of recovery is unaffected by a recovery subsequent to his death, in the intestate's action.

But the distinction exists because the statute creates it. The relatives do not take under the injured party, or through him, but they cannot recover if the injured party dies without a right of action, howsoever that condition may be created, whether by satisfaction voluntarily received by the injured party, or by a suit prosecuted to judgment and recovery in his lifetime, or by a judgment in an action instituted by him, whether rendered before, or after his death, to the effect that he was not entitled to maintain an action, and recover damages in respect of the injuries of which he complained.

The statute evidently requires an existent right to the injured party, at the time of death, as a basis for the maintenance of the action for the relatives. As soon as evidence is furnished that this right did not exist at this time, the defendant has afforded a successful defense to the action for the intestate's death.

The plaintiff is concluded as to his present action by the result in the former action not because the parties are the same, or the plaintiff sues in the same rights and capacities, or the recovery is the same or for the same people, but because the plaintiff in this suit cannot recover unless the injured party died in the possession, so to say, of a valid and subsisting right of recovery against the defendant, growing out of the alleged

wrongs which constitute the basis of the pending action. The conclusion reached in the prior action is a final ascertainment that at the time of his death the plaintiff possessed no such right.

It follows from the view taken of our statute, supported as this view is by the decisions of the courts of other states, on cognate statutes, that while it is considered that there are two rights of action for one act of wrongdoing, and that the recovery in one after the death of the decedent would not operate to defeat recovery in the other (this is the case of Leggott's Admr. *v.* Great Northern R. Co., supra), yet the right to maintain the second action is conditioned upon the existence in the intestate at the time of his death of a good cause of action. It is further considered that the judicial ascertainment afforded in the case heretofore tried, that Brammer had no right of action against the Norfolk and Western Railway Company, effectually bars any right of recovery in the present action.

The effect of the former decision is of course tantamount to a finding in express terms that at the time of Brammer's death, he was not entitled to maintain an action for damages against the defendant. The demurrer to the defendant's plea is overruled.

E. W. SAUNDERS, *Judge.*